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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 IN RE: PHENYLPROPANOLAMINE
8 (PPA) PRODUCTS LIABILITY
9 LITIGATION,

MDL NO. 1407

ORDER GRANTING
PLAINTIFFS' MOTION TO
REMAND

10 This document relates to:

11 Lewis v. Bayer Corp., et al.,
12 No. C04-00013R

13 THIS MATTER comes before the Court on the motion of
14 plaintiffs Royal and Sharlet Lewis ("plaintiffs") to remand the
15 case to state court in Mississippi. Having reviewed the papers
16 filed in support of and in opposition to this motion, the Court
17 rules as follows:

18 I. BACKGROUND

19 Royal and Sharlet Lewis filed their complaint in Mississippi
20 state court on November 1, 2001. Plaintiff Royal Lewis alleges
21 that he suffered a stroke after consuming Alka-Seltzer Plus, an
22 over-the-counter cold remedy containing the ingredient phenylpro-
23 panolamine ("PPA"). Mr. Lewis contends that the medication was
24 manufactured by defendant Bayer Corporation and sold to him by
25 defendant Double Quick, Inc. ("Double Quick"), a Mississippi
26 corporation.

1 Defendants filed their Notice of Removal on May 9, 2003,
2 alleging that federal court jurisdiction existed based on
3 diversity of the parties. Defendants claim that plaintiffs
4 fraudulently joined Double Quick, the only in-state defendant,
5 solely to defeat diversity jurisdiction. Plaintiffs moved to
6 remand to state court. While plaintiffs' motion to remand was
7 pending, the case was transferred to this Court as part of multi-
8 district litigation ("MDL") No. 1407.

9 II. ANALYSIS

10 Plaintiffs contend that defendants improperly removed this
11 case, and remand is appropriate, because the Notice of Removal
12 was untimely and because the in-state defendant, Double Quick,
13 was properly joined and defeats diversity. The removing parties
14 have the burden of proving that removal was proper and that this
15 Court has jurisdiction. See, e.g., Gaus v. Miles, Inc., 980 F.2d
16 564, 566 (9th Cir. 1992). The Court finds that defendants'
17 Notice of Removal was untimely, and therefore remand is
18 appropriate.

19 A. Timeliness of Removal

20 Defendants filed their Notice of Removal approximately 18
21 months after this action was commenced in state court.
22 Defendants contend that this case was not immediately removable
23 and did not become removable until they learned through discovery
24 facts that cast doubt on whether plaintiffs purchased the Alka-
25 Seltzer product from defendant Double Quick.

26 The statutory time limits for removing an action which is

1 not immediately removable are set forth in 28 U.S.C. § 1446(b),
2 which provides:

3 If the case stated by the initial pleading is not
4 removable, a notice of removal may be filed within thirty
5 days after receipt by the defendant, through service or
6 otherwise, of a copy of the amended pleading, motion, order
7 or other paper from which it may be first ascertained that
the case is one which is or has become removable, *except*
that a case may not be removed on the basis of [diversity
jurisdiction] more than 1 year after commencement of the
action.

8 28 U.S.C. § 1446(b) (emphasis added); see also Caterpillar, Inc.
9 v. Lewis, 519 U.S. 61, 69 (1996) ("No case . . . may be removed
10 from state to federal court based on diversity of citizenship
11 more than 1 year after commencement of the action"). Removal
12 statutes are strictly construed against removal. See, e.g.,
13 Gould v. Mutual Life Ins. Co. of New York, 790 F.2d 769, 773 (9th
14 Cir. 1986).

15 It is undisputed that defendants did not file their Notice
16 of Removal within the one-year time limit prescribed by 28 U.S.C.
17 § 1446(b). Defendants argue, however, that their Notice of
18 Removal should be considered timely because there is an equitable
19 exception to the one-year time limit, and that equitable
20 exception applies here. The Court does not agree.

21
22 As an MDL court sitting in the Ninth Circuit, this court
23 applies the Ninth Circuit's standards to the motion to remand.
24 See, e.g., In re Diet Drugs Prods. Liab. Litig., 220 F. Supp. 2d
25 414, 423 (E.D. Pa. 2002); In re Tobacco/Gov'tal Health Care Costs

1 Litig., 100 F. Supp. 2d 31, 34 n.1 (D. D.C. 2000). The Ninth
2 Circuit has never held that there is an equitable exception to
3 the one-year time limit. Other courts addressing the issue have
4 concluded that the statutory language is clear and includes no
5 exceptions. See, e.g., Lovern v. GMC, 121 F.3d 160, 163 (4th
6 Cir. 1997) (declining to find that equitable exception exists
7 with respect to one-year time limit to remove diversity cases).¹
8

9 Even if an equitable exception were available, defendants
10 have not shown that the exception applies to the facts of this
11 case. Courts have applied the exception in rare, limited cases
12 in which there was evidence that plaintiffs had engaged in
13 tactical behavior to prevent defendants from removing the case
14 within the statutory time limit. For example, in the case relied
15 on by defendants, Tedford v. Warner-Lambert Co., 327 F.3d 423,
16 426 (5th Cir. 2003), plaintiff dismissed her claims against the
17 only in-state defendant immediately after the one-year time limit
18 for removal had expired. Because plaintiff had engaged in
19 "consistent forum manipulation" to prevent a timely removal, the
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21
22 ¹ District courts in this Circuit have declined to apply an
23 equitable exception because the statutory language imposing the
24 one-year time limit is plain and includes no exceptions. See,
25 e.g., O'Brien v. Powerforce, Inc., 939 F. Supp. 774, 780 (D. Haw.
26 1996) (holding that one-year time limit must be strictly
construed despite any claim of fraudulent joinder); Hom v.
Service Merchandise Co., Inc., 727 F. Supp. 1343, 1345 (N.D. Cal.
1990) (citing Rezendes v. Dow Corning Corp., 717 F. Supp. 1435,
1438 (E.D. Cal. 1989)).

1 court allowed defendants to remove after one year. Tedford, 327
2 F.3d at 428.² In this case, defendants have not shown that
3 plaintiffs engaged in gamesmanship to preclude a timely removal.
4 Plaintiffs did not amend their pleadings after the one-year
5 removal period expired, rather, they have continuously asserted
6 claims against Double Quick, and they have provided facts to
7 support those claims. Instead of showing that plaintiffs have
8 engaged in forum manipulation, defendants have shown nothing more
9 than a disputed issue of fact regarding whether plaintiffs
10 purchased the PPA-containing product from Double Quick. Even if
11 this factual issue is ultimately resolved in their favor,
12 defendants have not shown that they should be exempted from the
13 statutory one-year time limit. Because the Court finds that
14 defendants' Notice of Removal was untimely, the Court need not
15 address plaintiffs' additional arguments in support of their
16 motion to remand.
17

18 B. Plaintiffs' Request for Fees and Costs
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20 Plaintiffs request that the Court order defendants to pay
21 the costs and attorneys fees incurred by plaintiffs as a result
22 of the improper removal. See 28 U.S.C. § 1447©). The Court
23

24 ²See also Morrison v. National Benefit Life Ins. Co., 889 F.
25 Supp. 945, 949 (S.D. Miss. 1995) (applying equitable exception
26 where plaintiff misrepresented amount of damages sought and
increased amount to above the jurisdictional limit immediately
after one-year period expired).

1 finds that defendants had a colorable argument for removal, and
2 therefore fees and costs are not warranted.

3
4 III. CONCLUSION

5 The Court concludes that defendants' Notice of Removal was
6 not filed within the time limits prescribed by 28 U.S.C. §
7 1446(b). Therefore, the Court GRANTS plaintiffs' motion and
8 ORDERS that this case be remanded to the circuit court of Bolivar
9 County, Mississippi, where it was previously assigned Civil
10 Action No. 2:03CV172. Plaintiffs' request for recovery of fees
11 and costs against defendants pursuant to 28 U.S.C. § 1447©) is
12 DENIED.

13 DATED at Seattle, Washington this 26th day of March, 2004.
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16 s/ Barbara Jacobs Rothstein
17 BARBARA JACOBS ROTHSTEIN
18 UNITED STATES DISTRICT JUDGE
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